

Service Date: March 6, 1992

DEPARTMENT OF PUBLIC SERVICE REGULATION  
BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MONTANA

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|---------------------------------|---|--------------------|
| IN THE MATTER of the BOEING     | ) | UTILITY DIVISION   |
| COMPANY AND MONTANA AVIATION    | ) |                    |
| RESEARCH COMPANY, Petition for  | ) |                    |
| Declaratory Ruling on Public    | ) | DOCKET NO. 92.1.2  |
| Service Commission Jurisdiction | ) |                    |
| Over Performance of a Water     | ) | DECLARATORY RULING |
| System Agreement.               | ) |                    |

I. INTRODUCTION

1. On January 10, 1992 the Montana Public Service Commission (Commission) received a Petition for Declaratory Ruling from The Boeing Company (Boeing) and Montana Aviation Research Company (Aviation Research), a wholly owned subsidiary of Boeing (jointly, Boeing and Aviation Research will be referred to herein as "MARCO"). On January 23, 1992, the Commission issued a Notice of Petition for Declaratory Ruling, allowing for comments until February 18, 1992. The Commission has received comments from MARCO, the City of Glasgow (City), Valley County (County), and Valley Park, Inc. (Valley Park).

II. FACTS

2. MARCO proposes to purchase the former Glasgow Air Force Base (the Base) from the County. MARCO, the County, the City, Valley Park, and the North Valley County Water and Sewer District, Inc. (the District) have executed and placed in escrow

a Water System Agreement (Agreement). The Agreement provides for the use of existing water supply facilities by the various parties, if MARCO completes acquisition of the Base. Before it will purchase the Base, MARCO requires a determination by the Commission that neither Boeing nor Aviation Research are public utilities or otherwise subject to Commission jurisdiction in delivering water to the District or the City.

3. The existing water supply facilities include a twenty-four mile water pipeline and processing system (transmission system) consisting of an intake on the Missouri River (River), the pipeline itself, several pumping stations, a treatment plant, and various easement and incidental properties. The transmission system is located outside the boundaries of a housing and commercial development area adjacent to the Base, referred to as St. Marie. The existing facilities also include a water distribution system within St. Marie and extending to a few adjacent building sites. The distribution system consists of a main distribution line, elevated storage tank, distribution system piping, service lines, and fire hydrants.

4. MARCO intends to operate an aircraft testing and flight training facility, upon purchasing the Base. MARCO's interest in the Agreement is to procure a water supply system for its operations at the Base.

5. The residents of St. Marie recently elected to form the District pursuant to Title 7, chapter 13, parts 22 and 23, MCA. The District is responsible for providing water and sewer

services to St. Marie. The District desires to acquire a long-term water supply to satisfy the requirements of its commercial and residential customers, including St. Marie and several adjacent commercial facilities.

6. Valley Park owns and is developing the undeveloped portions of St. Marie. Valley Park also needs to ensure that the District has an adequate supply of water to supply water and sewer services to St. Marie. Individuals have purchased about 50 housing units within St. Marie.

7. The County presently owns the transmission and distribution systems and proposes to transfer the obligations and responsibilities it assumed upon acquiring the Base from the federal government in 1979. These obligations include furnishing water and sewer service to the Base and the adjacent housing areas and maintaining and, when necessary, repairing and refurbishing the systems.

8. The City has had an arrangement with the County to alternate usage of the intake facility and the first stage pumping. The City takes the water pumped from the River to a "T" on the pipeline system located about eight miles north of the intake facility. From the "T" the City transports the water to the City through a City-owned pipeline. The City holds its own water right and fully controls its operations, taking the entire flow of water when necessary to satisfy its water needs. The County does not share control or expenses of such operations by

the City. The City/County arrangement remains unchanged upon MARCO's proposed purchase of the Base.

9. When the County acquired the Base, it also acquired the entire transmission system to the Base and distribution system in the housing areas. It obligated itself to provide an adequate water supply to the areas adjacent to the Base at "fair and reasonable rates based on current charges in the area." Upon transfer to MARCO, the County will no longer have this obligation.

10. If deemed not a public utility, MARCO will purchase from the County the transmission system from the River to the boundary of St. Marie. The City will continue to use the lower portion of the pipeline, as it has under the existing arrangement with the County, to draw water appropriated by the City from the River in an amount up to 2.5 million gallons per day and transport such water to the City-owned pipeline. The City will continue to distribute its water to its customers.

11. MARCO and the City will use the pipeline on an alternating basis with the City responsible for and conducting all operations when it is drawing water and MARCO responsible for and conducting all operations when it is drawing water. The City will reimburse MARCO for its pro rata share of the operating expenses and capital costs related to the lower pipeline from the intake to the "T."

12. The County will convey to the District the distribution system located within St. Marie. MARCO will transport wa-

ter through the transmission system (including treatment facilities) and sell treated water in an amount up to 2.0 million gallons per day to the District at a single metered gate at the District's boundary. The price for water to the District, as agreed upon, is fixed for the first five years (\$1.12 per 1,000 gallons). The price is then modified to account for a standard price index for the following three years, and thereafter set by fixed formula for perpetuity, with the first five remaining years capped.

13. The District will resell the water to its government, commercial, and residential customers located within St. Marie and on the adjacent property. MARCO will retain a maximum of 500,000 gallons of water per day for its own uses at the base. If necessary, the District, the City, and MARCO have provided for expansion of the capacity of the transmission system. The pipeline is in need of major repair. MARCO will undertake, as necessary, repairs on the transmission system from the River to the St. Marie boundary, to ensure continued use of the transmission and distribution systems. Except for MARCO supplying water to itself, selling water to the District, and reserving uses to the City, no other entity will have access to the transmission system.

14. If MARCO sells the Base property, it must complete all required repairs on the pipeline system and use reasonably good faith efforts to arrange for the purchaser to assume MARCO's obligations. If the purchaser will not assume those obligations,

MARCO must convey all of its interest in the lower pipeline to the City and all of its interest in the upper pipeline to the District. The District and the City will continue to receive the share of the water allocated to them. MARCO is required to negotiate a settlement with the District, whereby the District is in the same position as it would have occupied had MARCO not sold the Base.

### III. QUESTION PRESENTED

15. The question of law presented to the Commission is whether MARCO, as described in the facts presented by MARCO, is a public utility or common carrier subject to the jurisdiction of the Montana Public Service Commission. The Commission determines that MARCO is not subject to Commission jurisdiction. However, the Commission reaches its opinion on grounds other than those presented in briefs.

### IV. ANALYSIS

#### A. Status as a Public Utility

16. The question of public utility status arises in the delivery of water to either the City or the District. Section 69-3-101, MCA, defines "public utility" and provides exemptions from the definition. A public water utility, pursuant to definition owns, operates or controls plant or equipment and/or any water right(s) within the state for production, delivery or furnishing for or to other persons, firms, associations or corpora-

tions, water for business, manufacturing and/or household use. § 69-3-101(1)(a), MCA. Privately owned and operated water and/or sewer systems that do not serve the public are exempted from the definition. § 69-3-101(2)(a), MCA. Likewise, county water or sewer districts are not public utilities. § 69-3-101(2)(b), MCA.

17. The Commission determines that the MARCO-City relationship does not make MARCO a public utility. MARCO does own plant and equipment. However, pursuant to the provision for joint operation and control, the City produces, delivers, and furnishes water to itself through facilities that it operates and controls. MARCO does not perform the requisite "production, delivery, or furnishing to or for" others. Mere ownership of the facilities does not cause MARCO to fall within the definition of public utility under the entirety of the facts presented. The MARCO-City relationship results from the long-term relationship between the County and the City, in which the City produced, delivered and furnished water to itself. The City pays MARCO only its pro rata share of operating and capital costs.

18. The relationship between MARCO and the District requires a more detailed analysis. Based on the following reasoning, the Commission also determines that the MARCO-District relationship does not make MARCO a public utility. MARCO's primary intent is to purchase an airfield, conduct flight training and aircraft testing operations, and supply itself with water. MARCO has not set out to supply water to another. Incidental to

supplying water to itself, MARCO has agreed to supply water to the District. But for MARCO's relationship with the City and the District, no other entity will have access to the pipeline. MARCO will be supplying water to a county water district expressly exempt from public utility regulation by statute (§ 69-3-101(2)(b), MCA). Pursuant to Title 7, Chapter 13, Part 2200, persons within the boundaries of a proposed district vote on the question of creating the district (an election). Upon a favorable vote, a district formed by the election has powers, including the power to acquire a water supply by construction, purchase, lease or otherwise. § 7-13-2218(1), MCA. A district also has the power to sell water or the use of water for household, domestic or similar purposes to municipalities or to consumers located within or outside district boundaries. § 7-13-2218(7), MCA.

19. The District has the obligation to provide water to the consumers within its boundaries. The ultimate consumer interests are the responsibility of the District and not the Commission, which is expressly proscribed from regulating the District. In supplying water to the District, MARCO will not be delivering water to the public but rather to an entity statutorily exempt from Commission regulation.

20. MARCO, not otherwise a public utility, does not acquire public utility status in this limited situation where it delivers water to the metered gate at the District's boundary. In this situation, MARCO is a privately owned and operated sys-

tem serving itself and providing water to a county water district. MARCO, therefore, does not serve the public and is exempt from regulation. § 69-3-101(2)(a), MCA. If circumstances should change and MARCO decide to serve the public, the Commission would reexamine the question of its public utility status.

21. This ruling is binding upon MARCO and determines its rights only upon the factual situation presented. If MARCO were otherwise a public utility, then the Commission would exercise its jurisdiction over its provision of water to the District.

22. The sale of water by MARCO will be through this metered gate, in bulk, for resale and distribution to consumers by the District, a self-regulated entity with the right to acquire its water supply and to set its rates and terms for its customers, subject to any restrictions in Title 7, MCA, or other governmental restrictions not found in Title 69, MCA. MARCO's intended operations are outside the definition of "public utility" provided by Section 69-3-101, MCA.

B. Common Carrier Status

23. The Commission will briefly address MARCO's ancillary contention that it is not a "common carrier" pursuant to § 69-11-101, MCA. The Commission has never interpreted, and finds no basis to interpret, chapter 11 as applying to the transportation of water by pipelines.

24. Pursuant to statutory construction, when general and particular provisions are inconsistent, the particular intent

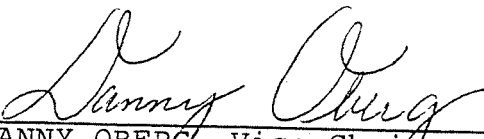
controls the general. § 1-2-102, MCA. The Commission cannot infer a general intent in § 69-11-101, MCA, for a "contract for carriage" of "property" from these circumstances. The specific and particular intent of § 69-3-101 et seq., MCA, governs where there is a specific question of delivering water (not the more general "property") on transmission facilities to others. Common carrier concepts are not germane to this situation.

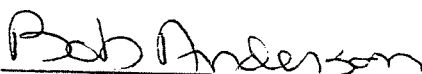
V. DECLARATORY RULING


25. Fully apprised of all premises, the MONTANA PUBLIC SERVICE COMMISSION HEREBY DECLARES that, in furnishing and delivering water to the City of Glasgow and the Valley County Water District, the Boeing Company and Montana Aviation Research Company, individually or jointly, do not hold status as a public utility or common carrier regulated by the Montana Public Service Commission.

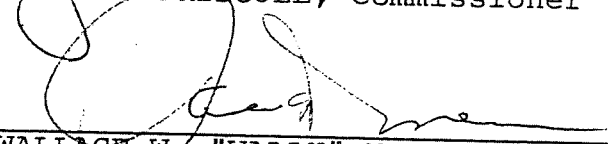
Done and Dated this 6th day of March, 1992 by a vote of  
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BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

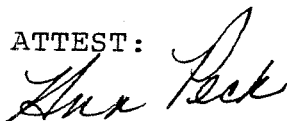
  
DANNY OBERG, Vice Chairman

  
BOB ANDERSON, Commissioner

  
JOHN B. DRISCOLL, Commissioner

  
WALLACE W. "WALLY" MERCER, Commissioner

ATTEST:

  
Ann Peck  
Commission Secretary

(SEAL)

NOTE: Any interested party may request that the Commission reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.